the escape has been voluntary and the officer has been actuated by fraud, malice or corruption: *Hootman* v. *Shriner*, 15 Ohio St. 43 (1864). In an action for an escape where the complaint is in the nature of a declaration in an action of debt, 2 R. S. 437, § 63, the defendant cannot show the insolvency of the debtor in mitigation: 4 Bosw. 384, 391; New York Sup. Ct., *McCreery* v. *Willett*, 23 Howard Pr., affirming 4 Bosw. 643 to same effect (1859); *Renich* v. *Osler*, Id. 384; *Barnes* v. *Willett*, 35 Barb. 514, s. c. 12 Abb. Pr. 448, affirming 11 Id. 225; 19 How. Pr. 564; N. Y. Common Pleas 1862, *Daguerre* v. *Orser*, 15 Abb. Pr. 113, affirmed 10 Id. 12, *note*. This is so where the action is founded on statutory liability imposed by code upon the sheriff neglecting to justify after notice of exception: 9 How. Pr. 188; Abb. Pr. 256; 1 Bos. & P. 450; 14 East 599; *Metcalf* v. *Stryker*, 31 N. Y. 255, affirmed 31 Barb. 62; same more fully reported in 10 Abb. Pr. 12; *Bensel* v. *Lynch*, 14 N. Y. 162, affirmed 2 Rob. 448; compare *Smith* v. *Knapp*, 30 N. Y. 580; 2 Abb. N. Y. Dig. 783–788. In Louisiana, a sheriff is only liable for actual damages sustained: *Bojel* v. *Bell*, 15 La. Ann. 163. By 3 R. S., 5th ed., 853, § 21, if an actual loss or injury shall have been produced to any party, by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party, and to satisfy his costs and expenses, which shall be paid over to him on the order of the court. And in such case the payment and acceptance of such fine shall be an absolute bar to any action, by such aggrieved party, to recover damages for such injury or loss.

HUGH WEIGHTMAN.

NEW YORK.

(*To be continued.*)

RECENT AMERICAN DECISIONS.

Supreme Court of Kansas.

HARRISON BERRY *v.* MONTGOMERY CARTER.

Where several persons enter into a written contract, stipulating that each shall keep up his own cattle, and prevent the same from trespassing upon or injuring the crops or hedges of any of the others, for the period of three years, and that in case any injury should occur by reason of the cattle of any one of said persons trespassing upon the crops or hedges of any of the others, and in case the parties themselves could not agree upon the amount of the damages sustained, then that the question as to the amount of such damages should be submitted to arbitrators,

consisting of three of the signers to said contract; one of such arbitrators to be selected by each of the parties, respectively, and the third one to be selected by the other two arbitrators; and that the decision of such arbitrators should be final between the parties: *Held*, that such contract is valid and binding.

And, in such a case, where the cattle of B. (one of the parties to said contract) trespass upon the crops of C. (another of the parties to said contract), and injure said crops, and B., on the demand of C., refuses to pay any damages, and refuses to recognise said contract as having any force or validity: *Held*, that C. may immediately, and without offering to submit the question of damages to arbitrators, commence an action against B. for the amount of such damages. B., by refusing to recognise the validity of said contract, waives his right to have the amount of said damages determined by arbitrators under the contract.

And, under said contract, it makes no difference, with reference to C.'s right to recover, whether C.'s crops were fenced or not.

Where B.'s cattle trespass upon the crops of C. and C.'s cattle upon the crops of B., these mutual trespasses do not in and of themselves rescind or destroy said contract, or render any of its stipulations inoperative.

And where C.'s cattle trespass upon the crops of B., and B. does not claim that his crops were fenced, or that C. drove his cattle onto said crops, or that B. was willing or that C. was unwilling to submit the question of damages to arbitrators under the contract: *Held*, that B. has no cause of action against C. for said damages; that before B. can have a cause of action against C., in such a case, he must be willing and C. unwilling to submit the question of damages to arbitrators in accordance with said contract.

THIS action was commenced in a justice's court, and, after trial and judgment, it was appealed to the District Court, where it was again tried, and on such trial judgment was rendered in favor of the plaintiff, Carter; and the defendant, Berry, as plaintiff in error, then brought the case to this court.

The opinion of the court was delivered by

VALENTINE, J.—The plaintiff below set forth in his bill of particulars two causes of action. We think there was no misjoinder of such causes of action; but, even if there was, still, as the question was not raised in the trial court, but is raised for the first time in this court, we must hold that no error was committed by the court below, in adjudicating upon both of said causes of action.

The first cause of action was founded upon a written instrument. The plaintiff did not furnish a copy of said written instrument with his bill of particulars, nor did he introduce either the original or a copy thereof in evidence. But he alleged in his bill of particulars that the original was lost, and on the trial he sufficiently proved its loss, and then proved the contents thereof by parol evidence. No objection was made in the court below to the introduction of said parol evidence, and hence, of course, no error was

committed in permitting it to go to the jury. Said written instrument was a contract, made and signed by the parties to this action and by several other persons. It was in substance as follows: Each signer was to keep up his own cattle, and prevent the same from trespassing upon or injuring the crops or hedges of any one of the other signers for the period of three years. But in case any injury should occur within that time, by reason of the cattle of any one signer trespassing upon the crops or hedges of any other signer, and in case the parties themselves could not agree upon the amount of the damages sustained, then the question as to the amount of such damages was to be submitted to arbitrators, consisting of three of the signers to said written instrument—each party choosing one of such arbitrators, and these two a third; and the decision of the arbitrators was to be final between the parties. We know of no reason why such a contract should not be valid and binding.

The defendant's cattle trespassed upon the plaintiff's wheat crop and injured it. The wheat stood growing in a field around which no fence or other lawful enclosure existed; but if said contract was valid and binding, and we think it was, it made no difference whether said field was fenced or not. The plaintiff, after driving said cattle from his wheat field to the defendant's premises, demanded of the defendant damages for the injuries which he (the plaintiff) claimed that the cattle had committed and he had sustained. But the defendant refused to pay any damages, said that he would not be bound by said contract, and that if the plaintiff got anything out of him it would be by law. The defendant himself testified on the trial: "I told plaintiff that I had consulted with attorneys with reference to said contract, and that I would not recognise it, as others had not recognised it."

The plaintiff did not propose to appoint arbitrators under the contract, and under the circumstances we do not think that he was required to do so. It would have been an idle and useless ceremony to propose an arbitration under a contract which the defendant refused to recognise. The defendant, by refusing to recognise the contract, waived his right to an arbitration, and at once gave authority to the plaintiff to sue him for the damages which the plaintiff had sustained, in any court having the requisite jurisdiction.

The defendant offered to prove on the trial that the plaintiff's cattle had trespassed upon his crops, but the plaintiff objected, and

the court sustained the objection. The defendant (plaintiff in error) now claims that this ruling of the court below was erroneous. We do not think, however, that it was erroneous. The defendant did not inform the court below for what purpose he offered to introduce said evidence, and he had no bill of particulars or other pleading on file (for he had filed none) from which his purpose might be ascertained or inferred. But we would think said evidence was incompetent for any purpose. It was certainly not sufficient to show that the parties had by mutual consent rescinded said contract or waived its terms. The contract itself contemplated that there would be trespasses, and provided a way for settling the damages caused thereby. Each party had a right under the contract to recover damages for trespasses committed by the cattle of the other party, and each party had a right to have these damages determined in a particular manner. And neither party lost his rights under the contract by permitting his cattle to trespass upon the crops of the other party. Therefore, as mutual trespasses would not of themselves and could not of themselves revoke or destroy the contract, then said evidence could have been relevant only for the purpose of establishing a counter-claim or set-off. But it was not sufficient for that purpose. A counter-claim or set-off is necessarily *a cause of action* in and of itself and in favor of the defendant and against the plaintiff, and a set-off must be a cause of action arising *upon contract* or ascertained by *the decision of a court.* A trespass disconnected with contract could not be the subject of set-off. But the defendant's evidence did not even prove a cause of action of any kind. It did not prove or tend to prove that the defendant's crops were fenced, or that the plaintiff drove his cattle upon the defendant's crops; nor did it tend to prove any other contract than the one we have already mentioned. Now under that contract the defendant did not have either counter-claim or set-off. Under that contract it was not only necessary that the defendant's crops should have been injured by the plaintiff's cattle, in order to give the defendant a cause of action, but it was also necessary that the defendant should have been ready and willing to have his supposed damages adjudicated under the contract by arbitrators, and that plaintiff should have been unwilling to have such damages so adjudicated. Now there is no pretence that the defendant was ever willing, or that the plaintiff was ever unwilling, to submit any question of damages to arbitrators accord-

ing to said contract. Indeed, the defendant wholly ignored the contract and refused to recognise it. This is shown by the testimony of the defendant himself while on the witness stand. If the defendant has really sustained any damage by reason of the plaintiff's cattle trespassing upon his crops or hedges, he may hereafter offer to submit the question of damages to arbitrators according to the contract, and then if the plaintiff refuse, the defendant will have a cause of action against the plaintiff. But from the evidence he has no such cause of action now.

The judgment of the court below will be affirmed.

I. It was decided in *Hochster* v. *De La Tour*, 2 E. & B. 678, and in *Frost* v. *Knight*, Law Rep. 7 Exch. 111, that an action could be maintained upon an executory contract, before the time of fulfilment had arrived, where the defendant had notified the plaintiff that he repudiated the contract. In the latter case the defendant had promised to marry the plaintiff upon his father's decease, but subsequently told her that he did not intend to do so. The suit was held to have been well brought (for breach of promise) during the lifetime of the defendant's father. So in the present case the notification by the defendant that he would not be bound by the contract to arbitrate, was equivalent to an appointment by the plaintiff of an arbitrator and a refusal by the defendant.

II. The question of whether the agreement to arbitrate in any particular case amounts to a condition precedent to a right of action, is one which the court, especially in policies of insurance, is frequently called on to decide.

(*a*) There is no doubt of the general principle that "Parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases." Per Lord Chancellor CRANWORTH, in *Scott* v. *Avery*, 5 H. of L. Cases 846.

(*b*) "If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action.

"But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the same. For to say the contrary, would be to give the party a different measure or rate of compensation from that for which he has bargained. This is plain common sense, and is what the House of Lords decided in *Scott* v. *Avery*, *supra*." Opinion of BRAMWELL, B., in *Elliott* v. *Royal Exchange Assurance Company*, Law Rep. 2 Exch. 245.

Thus, where a lessee covenanted with a lessor that he would keep such a number only of hares and rabbits as would do no injury to the crops, otherwise to pay a fair and reasonable compensation, the amount of which, in case of difference, was to be referred to two arbitrators, it was held by the Court of Appeal that the covenant to refer the amount of compensation was collateral, and that the action was maintainable, though there had been no arbitrators: *Dawson* v. *Lord Otho Fitzgerald*, 1 Exch. Div. 257, 260. In this case JESSEL, M. R., stated the law to be that a defence to an action of this kind on the ground that no arbitration had occurred, could only be made in two cases: "First, where the action can

only be brought for the sum named by the arbitrator. Secondly, where it is agreed that no action shall be brought until there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first." Judgment for the plaintiff.

Two recent cases have gone very far in denying the right of a party to confer a general right and then restrain its complete exercise by a limitation of the right of recourse by the other party to the courts. In *Insurance Co.* v. *Morse*, 20 Wall. 445, a foreign insurance company had been allowed to do business in Wisconsin under a statute requiring an agreement by the company not to remove any suit for trial into the United States Courts. *Held*, that the statute and the agreement filed under it were void. In *Mentz* v. *Armenia Fire Ins. Co.*, 79 Penn. St. 480, a suit was brought on a policy of insurance providing, "In case any difference or dispute shall arise between the assured and this company touching the amount of any loss or damage sustained by him, such difference shall be submitted to the judgment of arbitrators, one to be appointed by each party, with power to select a third in case of disagreement, whose decision thereupon shall be final and conclusive; *and no action, suit or proceedings at law or in equity shall be maintained on this policy, unless the amount of loss or damage in case of difference or dispute shall be first thus ascertained.*" No reference having been shown the plaintiff was nonsuited, but the court above reversed this judgment citing *Ins. Co.* v. *Morse, supra*, holding that the agreement was a revocable, collateral covenant, merely subjecting the revoking party to an action for damages for the revocation. "It is not in the power of the parties thus to oust the courts of their general jurisdiction, any more than they have to add to it a personal covenant, that they are not to be responsible for the breach of it." Per SHARSWOOD, J.

III. *Revocability of reference before award delivered.*—If, therefore, a release has been made, either formally, or by the action of the parties, of existing claims; and a new liability, in consideration of such release, accrues by the terms of the contract to the releasor, to wit, such things as are determined in his favor by a third party, after execution of such an agreement, the releasing party cannot revoke and proceed upon his original claim.

The reason of this is obvious. All that remains after the execution of the agreement is a new obligation, and the agreement, if properly executed, by which the original rights have been lost, cannot be rescinded, because it is a conveyance, and the original obligations to the releasor have terminated and passed out of existence by the act of conveyance. His only right then is to enforce from the other party the consideration provided in the contract. This is the real explanation of that class of cases in which it is said that a contract cannot be revoked. The question then is no longer one of ability to terminate an agency, but of power to reinstate one's self in *statu quo* after conveyance made. Under this head may be included the dicta of COULTER, J., in *McGheehen* v. *Duffield*, 5 Barr 499, 500. There the plaintiff had discontinued a suit in chancery, and substituted for it an amicable action of account render, all matters of controversy in which were referred to the decision of an arbitrator. The term *dicta* is advisedly used, for the decision in this case can be supported on other grounds. The arbitrator had actually made his award and filed his report in court. Afterwards, by the consent of both parties, the matter was referred back to correct certain mistakes

upon the arbitrator's own application. The court held that an attempted revocation upon the day when the second report was filed, a short time before filing, was too late, and this was the opinion of the Supreme Court. "The umpire had heard the parties and made his award before the defendant's act of revocation. This was too late, as a submission cannot be revoked after award. The umpire produced his award in court after full hearing of the parties, and stated that he had made some mistakes which he wished to correct. The court declined to send it back without the consent of the parties, whereupon the parties agreed. This remittitur of the award to the umpire was the act of the parties, but was not a new submission. The act of revocation by the defendants was therefore a nullity."

So, in *Paist* v. *Caldwell*, 25 P. F. Smith 166, "Two suits were pending. * * * The parties agreed to consolidate these actions and try them before referees, who should render a final award, whether the defendant should pay anything, and if anything, how much, and the sureties agreed to become responsible for the entire final sum, while the defendant should be relieved from the obligation to take any conveyance under the contract of sale. Here valuable rights were released and acquired on each side." Per AGNEW, C. J.

Keeping in mind the difference between a termination of agency (which a principal has always the power to make, though he may be punished for its improper exercise), and the power to rescind a release or terminate an agreement not depending upon agency at all, let us pursue the subject further.

Where I agree that an obligation shall arise on my part, which obligation shall be the finding against me of an arbitrator, this is not a question of agency at all. No agency is delegated to the person who names the amount, and the test of this is, that where no express authority is given in the instrument to such arbitrator, the claim against me after his finding is equally good. For the finding of the arbitrator I might have substituted any accidental event, such as the falling of a tree, and it might be with equal propriety argued that I had delegated an authority to the tree to fall as a condition precedent to my liability, and if that authority were revoked, my liability did not arise. Such metaphysics as this are not listened to in a court of law. Hence it is a misapprehension on the part of the party to such a contract to suppose that he has any right of revocation, and the cases which decide against such a view merely hold that the principle is not one of agency at all. Under this class fall *Dawson* v. *Fitzgerald*, *supra*; *Monongahela Co.* v. *Fenlon*, 4 W. & S. 211. This well-known case was similar to that of *Scott* v. *Avery*, *supra*. The decision being not that an agreement between the parties can oust the jurisdiction of the court, but that where the only liability upon the contract is in respect to a sum found due by an arbitrator, that finding must be the basis of, and precedent condition to, an action at law. In its absence it is not that the liability has ceased, but that no liability has arisen. So in *Snodgrass* v. *Gavit*, 4 Casey 221, in which it was held that where there was an independent stipulation to refer to arbitration, as in *Dawson* v. *Fitzgerald*, *supra*, the plaintiff might recover upon the contract without showing a reference.

The principles above set forth are clearly stated in *Johnson* v. *Andress*, 5 Phila. 8, "that the parties had agreed to make the submission a rule of court would probably have made no difference, even if the rule had been entered of record before the authority of the arbitrators was revoked; as it was not the mere agreement to enter, it was at most an agreement that the authority of the arbitrators should be irrevocable, which it has been repeatedly held will

not prevent it from being revoked: *Toby* v. *County of Bristol*, 3 Story 800–823. Nor can the award be sustained on the ground that the arbitrators had agreed on what terms or principles the award should be made, before the revocation was communicated to them. An agreement to agree is obviously not a final agreement, particularly when, as here, it merely ascertains or fixes principles or data, and does not settle or arrive at conclusions or amounts. If an award had been drawn up, as in *Robinson* v. *Bickley*, 6 Casey 384, and signed by two of the arbitrators under circumstances which obviated the necessity for obtaining the signature of the third, a subsequent revocation would no doubt have been too late, but the arbitrators may, and indeed always should, weigh what they are doing until they actually sign, and may undoubtedly, down to the last moment before signing, refuse to put their names to any decision which they deem, on mature reflection, unjust, although all may have agreed to it as final at their last meeting. On the ground, then, that the exceptant was legally entitled to revoke the submission, and exercised that right in due season, we sustain the exceptions which have been filed, and set aside the award." Per HARE, P. J.

In numerous decisions expressions of opinion to the same effect may be met with. Thus, in *Keavy* v. *Shisler*, 8 Philadelphia 54, LYND, J., says, "And yet it cannot be denied that such power (*i. e.*, that a party after agreement that a cause should be referred, and that there should be no appeal, exceptions, or writ of error, should have the power to revoke the agreement at any time before making of the award, irrespective of the time, trouble, and expense of the opposite parties and of the referees) was, and is still, recognised in cases of reference at common law, as well as references under statute, where there is no suit pending, or where the reference is not made a rule of court. The technical sense which upholds this power does so upon the ground that an agreement to refer is, like any other agreement *in pais*, violable by the parties, and the party injured by such violation has his remedy by action at law, as in other cases of *injuria et damnum*."

The language of the learned judge is to the effect that the power to revoke exists where the reference *is not made a rule of court;* not that it only exists where it is not agreed that the reference shall be made a rule of court.

Again, in *Power* v. *Power*, 7 Watts 212, it was held by the Supreme Court, GIBSON, C. J., delivering the opinion, "That the submission to the determination of arbitrators, whether by deed, parol, or rule of court, like any other naked authority, is countermandable before execution of it, though expressed to be irrevocable. It was so entirely gone that the arbitrators could have legally acted only by force of a fresh delegation of authority."

And in *Bailey* v. *Stewart*, 3 W. & S. 560, it was again held that a submission was annulled by the death of one of the parties, and that the appearance before the referees by the personal representatives of the deceased party, and trial of the cause upon its merits, would not revive the agreement so as to charge a surety on the arbitration bond.

So in *Shisler* v. *Keavy*, 25 P. F. Smith 82, it was said, "while the general power to revoke a submission is well settled, yet after its execution it is beyond the dominion of either party."

The death of one of several plaintiffs will not revoke the submission: 3 Halstead (N. J.) 119.

Death of a party to a submission of a pending suit under a special statute expressly forbidding revocation without the leave of court (p. 304), is not a revocation of the submission: *Moore* v. *Webb*, 6 Heiskell (Tenn.) 304, 305. There can be no question that where

the submission is simply by deed or writing, and not by rules of court, and confers a simple power of arbitrators to act, the death of one of the parties would be a revocation of the authority, and any award made after this would be a nullity. Per FREEMAN, J.

Bringing suit upon the subject-matter referred was said in *Peters's Adm'r* v. *Craig*, 6 Dana (Ky.) 307, to be a revocation of the reference. In *Lowes* v. *Kermode*, 8 Taunt. 146, the pendency of an arbitration was incidentally held not a reason for withdrawing the suit from the jury, inasmuch as the court held the question of whether an *award* had been made a question for the jury and allowed the case to go on.

1. After an award has been made a court of equity will not interfere by injunction to restrain its execution unless equitable grounds are given therefor, but will leave the parties to their rights at law: *Pope* v. *Lord Duncannon*, 9 Simons 177. Here the vice-chancellor, though refusing an injunction, expressly said that the authority to the referees to fix the price was an authority which the plaintiff might revoke at law, "and as they have revoked it, the power of the arbitrators is completely destroyed at law." In other words, equity will not interfere to restrain the commission of an illegal act, except for equitable reasons, where there is an adequate remedy at law.

2. It has also been held, under the provisions of the statute in force in England, that after an award has been made, the mere fact that the submission had not been made a rule of court gave no jurisdiction to the court of chancery to restrain the execution of the award; that the entire jurisdiction vested in the court in which the submission had been made a rule, though that was done after the bill was filed: *Nichols* v. *Rowe*, 3 Myl. & K. 431. To the same effect are *Davis* v. *Getty*, 1 Sim. & Stu. 411, and *Dawson* v. *Saddler*, Id. 537. In the last three cases the award had been made, and the question was not one of power to revoke, but of jurisdiction.

3. It has also been held, that where a rule of reference has been entered according to the provisions of the Act of 1705 (Pennsylvania statute authorizing arbitrations to be made rules of court), such rule cannot be discontinued without the consent of the court. This proposition is evident. After an executed submission to the jurisdiction of the court, by a commencement of suit, the party cannot withdraw without the court's consent. Under this head may be classed *Pollock* v. *Hall*, 4 Dall. 222, s. c. 3 Yeates; *Oxley* v. *Olden*, 1 Dall. 430; *Rustom* v. *Dunwoody*, 1 Binn. 42; and in *Bradly* v. *Wolff*, 2 Yeates 343, a rule of reference was, for proper grounds, by permission of the court, allowed to be discontinued. So in *Ferris* v. *Munn*, 2 Zabriskie (N. J.) 161. *Carey* v. *Commissioners of Montgomery County*, 19 Ohio 281, was expressly decided under the Ohio statute, admittedly different (p. 281) from the common-law right of revocation. So where the record of the court showed a revocation and delivery upon the same day, but did not indicate priority, the Supreme Court will not disturb the decision of the court below: *Shisler* v. *Keavy*, 25 P. F. Smith 82. In that case the record also showed that the notice of revocation was given to one only of the referees, and there was no evidence that this notice had been communicated to either of the others. This ground alone would have been fatal to the power to revoke.

Where the award has been delivered and filed, and is re-referred to the arbitrator for the correction of a mistake by consent of the parties upon his own motion, the power to revoke no longer exists: *McGheehen* v. *Duffield*, *supra*. The agency has ceased upon the filing of the award. The arbitrator, upon a re-reference, becomes an officer of the court, like a master, or examiner, and his authority is not derived from, al-

though supported by, the consent of the parties.

There is another large class of cases in which it has been held that a delivered award will not be set aside by the court, unless for proper reasons, and that the court above will, in such cases, only look at the record, and, unless it discloses error, affirm the judgment below. Under this head may be classed *Rogers* v. *Playford*, 2 Jones 184; *Buckman* v. *Davis*, 4 Casey 214; *Massey* v. *Thomas*, 6 Binn. 337; *Painter* v. *Kissler*, 9 P. F. Smith 331; *Dickerson* v. *Rorke*, 6 Casey 380; *Robinson* v. *Bickley*, Id. 389. In several of these last cases, it was also decided that an agreement to refer need not contain an agreement to make the submission a rule of court, the latter being implied from the agreement itself. See *Huston* v. *Clark et al.*, 35 Leg. Intel. (Phila.) 48.

A. SYDNEY BIDDLE.

Supreme Court of Missouri.

FERGUSON *v.* BARTHOLOMEW ET AL.

A forcible entry of a claimant into the possession of the premises sued for does not have the effect of suspending the operation of the Statute of Limitations in favor of an adverse claimant; and when restitution is made by law, the period during which the forcible possession was held by the owner will be added to and become a part of the adverse possession of such adverse claimant.

THIS was an action of ejectment, instituted May 1st 1872, for military bounty lands lying in the county of Chariton, Missouri. The plaintiff had judgment in the action. The plaintiff and the defendant claimed through a common source of title. The plaintiff claimed title under a deed from the common grantor, dated March 11th 1822, executed in the state of Tennessee, and recorded in Chariton county April 2d 1842. This deed, when recorded, was neither proven nor acknowledged. Plaintiff connected himself with this conveyance by a regular chain of title-papers, all of which were recorded April 2d 1842, except the deed to himself, which was recorded June 19th 1848. The defendant claimed under a deed executed by the common grantor November 17th 1821, with which he connected himself by a regular chain of conveyances, all of which were recorded March 20th 1868. The defendant also relied on the limitation of two years, applicable to suits for military bounty lands, and proved the following facts:—

"That in the month of October 1868 one Krassig took the possession of the land sued for and built a house on it; that shortly afterwards, and about the time the house was completed, the plaintiff took forcible possession of the house and put his tenants in it; that Krassig took the possession and built the house under a con-